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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New	)	
Personal Communications	)	
Services	)	

OPPOSITION TO
PETITIONS FOR RECONSIDERATION

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Senior Vice President
Government Affairs

Lawrence R. Krevor
Director-Government Affairs

601 13th Street, N.W.
Suite 1100 South
Washington, D.C. 20005
(202) 628-8111

December 30, 1993

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SUMMARY

Nextel Communications, Inc. ("Nextel") submits its Opposition to petitions seeking reconsideration of the Commission's Second Report and Order in GEN Docket No. 90-314 ("PCS Order"). Nextel opposes petitions seeking larger spectrum bands, higher power limits, voluntary partitioning of markets, compatibility standards, and application of the cellular eligibility restrictions to Enhanced Specialized Mobile Radio ("ESMR") providers. Nextel supports licensing PCS in a more economical and spectrally-efficient manner and relaxing the requirements for construction of PCS systems.

In its Notice of Proposed Rulemaking in this proceeding, the Commission sought comment on restricting the eligibility of cellular licensees and local exchange carriers for co-located PCS licenses. The PCS Order adopted an eligibility rule applicable to cellular licensees. Several petitioners now ask the Commission to apply this same rule to ESMR licensees.

This proposal is outside the scope of the notice given in this rulemaking proceeding, and should therefore be rejected. "Regulatory parity" does not require application of eligibility limitations to all commercial mobile services providers merely because the Commission has found that market conditions warrant applying such restrictions to cellular licensees. Moreover, the public policy rationale that supports the cellular eligibility restriction --

limiting the exertion of undue market power -- cannot possibly apply to ESMR providers, who have not even begun operating in most markets.

Proposals to license PCS in 40 MHz blocks should be rejected. Indeed, no party has identified on the record of this proceeding any spectrum use that requires even 30 MHz of spectrum. Such a wasteful allocation of spectrum would retard the development of advanced, spectrally-efficient technology, and is not needed for accommodation of incumbent fixed microwave users. A mixture of 20 MHz and 10 MHz licenses would be more than sufficient.

Low power levels and small markets best suit the technical and market characteristics of 2 GHz PCS. The Commission should therefore reject proposals to increase dramatically the maximum power level for PCS base stations. Some of the markets the Commission has specified may be so large that a PCS system could not be constructed in accordance with the Commission's timetables. Rather than permit voluntary partitioning of such markets, the Commission should eliminate the over-sized MTA markets and relax the buildout requirements, allowing the marketplace to govern the pace at which PCS services develop.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314

OPPOSITION TO PETITIONS FOR RECONSIDERATION

INTRODUCTION

Nextel Communications, Inc. ("Nextel"), pursuant to Section 1.429 of the Federal Communications Commission's (the "Commission") Rules, hereby submits its Opposition to Petitions for Reconsideration of the Commission's Second Report and Order ("Order") in the captioned docket.[1] The Order established spectrum allocations, service areas, service rules and technical requirements for the provision of Personal Communications Services ("PCS"). Sixty-eight parties, including Nextel, filed petitions that, taken together, seek reconsideration of nearly every aspect of the Commission's decision.

Nextel opposes petitions seeking larger spectrum bands, higher power limits, partitioned markets, imposition of compatibility standards, and application of cellular eligibility standards to Enhanced Specialized Mobile Radio

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[1] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314, Second Report and Order , FCC 93-451 (released October 22, 1993), 58 Fed. Reg. 59,174 (Nov. 8, 1993).

("ESMR") providers. Nextel supports parties asking the Commission to license PCS in a more economical and spectrally-efficient manner, and to relax its requirements for construction of licensed PCS systems.

BACKGROUND

As a leading licensee of Specialized Mobile Radio ("SMR") systems, Nextel and its subsidiaries provide mobile communications services to approximately 200,000 mobile units on a daily basis on both 800 MHz and 900 MHz SMR systems. The company holds spectrum licenses in top U.S. markets, covering a population of over 100 million, and provides dispatch, interconnect and related services to its customers.

Nextel conceptualized and is now implementing Enhanced Specialized Mobile Radio systems using innovative digital technologies to increase dramatically the capacity, service flexibility and quality of existing communications systems. Nextel's systems utilize digital speech coding, Time Division Multiple Access ("TDMA") transmission and frequency reuse to yield up to 50 times the capacity of its existing SMR systems.

I. THE COMMISSION MAY NOT IMPOSE THE PCS CELLULAR ELIGIBILITY RESTRICTIONS ON ESMR OPERATORS IN THIS PROCEEDING.

US West, Inc., ("US West"), Sprint Corporation ("Sprint") and Point Communications Company ask the Commission to impose on ESMR providers the same eligibility restrictions that it adopted for cellular operators.[2] Cellular Telecommunications Industry Association ("CTIA") proposes that the Commission count SMR spectrum towards the 40 MHz limit on PCS ownership interests in a geographical area, while BellSouth Corporation ("BellSouth") similarly advocates a 45 MHz limit covering cellular, SMR, and broadband PCS spectrum.

All of these proposals are outside the scope of the notice that was given in this rulemaking proceeding and thus may not be adopted on reconsideration. Even if it were proper to expand the scope of the rulemaking at this late stage, the assertions put forth by petitioners provide no reasonable basis for the restrictions they propose. Nor is

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[2] New Section 99.204 of the Commission's Rules, 47 C.F.R. § 99.204, provides:

> Entities that have attributable ownership interest of 20 percent or more in an entity that is a licensee in the Domestic Public Cellular Radio Telecommunications Service shall not be eligible for assignment of more than one 10 MHz frequency block in any PCS service area where its cellular geographic service area (CGSA) includes 10 or more percent of the population of the PCS service area as determined by the 1990 census, i.e., 10 or more percent of the population of the respective BTA or MTA is within the CGSA.

the imposition of identical restrictions on cellular and ESMR licensees necessary to achieve "regulatory parity."

A. PCS Eligibility Restrictions for ESMR Licensees Are Outside the Scope of the Notice Given in this Proceeding.

Section 553(b) of the Administrative Procedures Act requires that notice of proposed rulemaking include "either the terms or substance of [a] proposed rule or a description of the subjects and issues involved."[3] The notice must be specific and must adequately apprise interested parties of the issues involved.[4] Although an adopted rule need not track the notice precisely, it must at least be a "logical outgrowth" of the proposed rule.[5]

The Notice of Proposed Rulemaking in the instant docket gave no hint that eligibility restrictions for SMR licensees

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[3] 5 U.S.C.A. §553(b)(3).

[4] See 5 U.S.C. § 553(b)(3); S. Report No. 752, 79th Cong., 1st Sess. 14 (1945) ("Agency notice must be sufficient to fairly apprise interested parties of the issues involved."); United States v. Florida East Coast R. Co., 410 U.S. 224, 243 (1973); Anne Arundel County v. EPA, 963 F.2d 412, 418 (D.C. Cir. 1992); American Medical Association v. U.S., 887 F.2d 760, 767-68 (7th Cir. 1989); Kollett v. Harris, 619 F.2d 134, 144 & n.13 (1st Cir. 1980); American Iron and Steel Institute v. EPA, 568 F.2d 284, 293 (3rd Cir. 1977); Baylson v. Disciplinary Bd. of the Supreme Court of Pennsylvania, 764 F. Supp. 328, 334 (E.D. Pa. 1991), aff'd 975 F.2d 102 (3rd Cir. 1992).

[5] Small Refiners Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 549 (D.C.Cir. 1983); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985); National Black Media Coalition v. F.C.C., 791 F.2d 1016 (2d Cir. 1986).

might be considered.[6] The NPRM contained a proposed rule prohibiting local exchange carriers ("LECs") and cellular operators from holding co-located PCS licenses.[7] There was also an extensive discussion in the text of the reasons for this proposal.[8] The textual discussion focused exclusively on the dangers and benefits of cellular and LEC participation in PCS.[9] At no point did the Commission expand its discussion, proposals, or tentative conclusions to include other market participants. The Commission did not even seek comment on whether the proposed cellular eligibility restrictions should be extended to any other

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[6] Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) ("NPRM").

[7] Id. at 5751 (Proposed Section 99.13).

[8] Id. at 5701-5707.

[9] See, for example, paragraph 67 of the Notice:

> We propose to allow cellular providers to obtain PCS spectrum licenses outside of their cellular service areas. However, we ask for comment on whether cellular providers also should be allowed to obtain PCS spectrum within their cellular service areas. Specifically, we seek comment on the impact on competition if cellular operators are permitted to obtain PCS licenses in their cellular operating areas. We also ask for comment on whether the amount of PCS spectrum held by cellular licensees should be limited, if they are allowed to hold any such spectrum. We further request comment on whether cellular providers should be eligible to hold licenses for the 900 MHz PCS services also proposed herein.

Id., at 5703 (emphasis added).

potential PCS licensees. The proposal to limit the total spectrum acquired or utilized by PCS licensees was likewise devoid of any mention of the idea that spectrum allocated to other services might be included in a cap.[10] Therefore, an interested person reading the NPRM could not have been apprised that restrictions on SMR licensees might be considered.[11] Such restrictions are thus outside the scope of the notice given in this proceeding and cannot be adopted on reconsideration.[12]

B. "Regulatory Parity" Does Not Require Identical Treatment of All Commercial Mobile Services Providers.

Section 6002(b) of the Omnibus Budget Act of 1993 ("Budget Act") amended Sections 3(n) and 332 of the Communications Act of 1934 to establish a new regulatory structure under which all mobile communications services will be classified as either "commercial mobile service" or

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[10] Id. at 5707.

[11] US West asserts that the question of whether ESMR providers should be treated the same as cellular operators with respect to PCS eligibility was raised by comments in earlier stages of this proceeding. Petition of US West at 21. US West's attempt to "bootstrap" the required notice is legally inadequate. Notice sufficient to satisfy the requirements of § 553 of the APA is not provided by the comments or petitions of the parties, but must be given by the agency itself. See, e.g., AFL-CIO v. Donovan, 757 F2d 330, 340 (D.C.Cir. 1985).

[12] The Order confirms the limited scope of the notice that was given on eligibility issues. In thirty-one paragraphs devoted to the subject of PCS eligibility restrictions, the Commission did not even mention applying them to entities other than LECs and cellular providers. See Order, ¶¶ 97-127.

"private mobile service." The Commission is in the process of implementing this legislation.[13]

Nextel does not dispute that the Budget Act requires that functionally equivalent mobile communications services be regulated in a similar manner. Nextel challenges, however, the superficial invocation by BellSouth, Sprint, and US West of "regulatory parity" to support applying cellular eligibility restrictions to ESMR licensees.

The Budget Act did not require identical regulation of all commercial mobile services providers. As the Commission recognized in its Notice seeking comment on regulations implementing the Budget Act:

> Section 332(c)(1)(A) states that a commercial mobile service provider shall "be treated as a common carrier for purposes of this Act, except for such provisions of Title II as the Commission may specify by regulation as inapplicable to that service or person." [emphasis added]. According to the Conference Report, "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." Additionally, the Conference Report explains that "the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier."[14]

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[13] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 93-454 (released October 8, 1993).

[14] Id., ¶53 (footnotes omitted).

Thus, the Budget Act expressly authorizes the Commission to impose different regulations upon the various carriers that will be classified as providers of commercial mobile services. It does not require that all commercial mobile service licensees be regulated in exactly the same way. The PCS eligibility restrictions for cellular carriers address market power considerations that are inapplicable to new entrant ESMR operators; the Budget Act amendments encourage such regulatory distinctions to promote a competitive wireless communications industry.

C. Petitioners Offer No Public Policy Rationale for Burdening New Market Entrants with Rules Necessary to Restrain the Exercise of Market Power by Entrenched Operators.

US West misleadingly suggests that the Commission limited cellular operators' acquisition of overlapping PCS licenses simply because cellular and PCS will offer comparable services. After insulting the Commission with the implication that it has imposed a significant constraint on a competitor just because it competes, US West goes on to devote three pages of its impermissibly-long petition to the entirely unremarkable proposition that ESMR providers will also compete with PCS. An extensive review of Nextel's press notices is offered as evidence that Nextel and other ESMRs should be restricted in their participation in PCS.

The Commission has made quite plain the actual basis for its cellular eligibility restrictions: "Our principal concern is that an incumbent cellular owner may exert undue

market power."[15] When the Commission's reasoning is thus correctly characterized, the absurdity of US West's proposal is exposed. The rationale that justifies limitations on entrenched cellular operators has no applicability to new market entrants like Nextel.

US West and BellSouth make much of Nextel's pending acquisitions of SMR licenses in major markets. Nextel has never hidden its intention to compete as a wireless services provider. Right now, however, Nextel's traditional analog SMR systems serve about 200,000 mobile units, primarily offering dispatch service.[16] Its first ESMR system, covering 18,000 square miles in the Los Angeles area, became operational only four months ago, in August of 1993. Nextel's potential to compete, while obviously unnerving to certain Bell Operating Companies ("BOCs"), does not give Nextel the ability to behave anticompetitively in markets it is only beginning to serve.[17] Thus, there is no public

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[15] Order, ¶107.

[16] By comparison, about 13 million subscribers are served by cellular telephone systems.

[17] The Commission has recognized the distinction between potential and actual competition. See, e.g., Implementation of Certain Sections of the Cable Consumer Protection Act of 1992, Rate Regulation, 8 FCC Rcd 5631, 5656 n. 85 (1993). See also Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, Comments of McCaw Cellular Communications, Inc. ("McCaw"), filed June 11, 1993 at 2 ("there is an immense difference between the opening of a market to competition...and its actual arrival and continued growth.").

policy rationale for imposing PCS eligibility restrictions on new entrant ESMR licensees.[18]

Indeed, if anyone should be made subject to additional eligibility restrictions on reconsideration, it is the BOCs, each of which has regional control of the local exchange bottleneck and is capable of damaging, and has damaged, competition through abuse of market power.[19]

II. THE COMMISSION MUST REJECT THE OUTRAGEOUS CLAIM THAT EACH PCS LICENSEE REQUIRES 40 MHZ OF SPECTRUM.

Throughout this proceeding, certain parties have sought to promote the notion that, unless each PCS licensee is given dominion over a huge block of spectrum, PCS will not work. Some of these parties are apparently satisfied with

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[18] Should the Commission determine that eligibility restrictions for ESMR licensees are within the scope of the notice given in this proceeding, and that some such restrictions are necessary, it should adopt the approach suggested by CTIA. Counting SMR spectrum towards the 40 MHz cap on PCS spectrum is far more reasonable than limiting a SMR operator to a single 10 MHz PCS license. Under the latter rule, a SMR operator with no share of a local wireless market could be limited to a total of 20 MHz, while a competing cellular operator could have 35 MHz at its disposal.

[19] Eligibility restrictions for BOCs are within the scope of notice in this proceeding. See NPRM at 5705-5707. The BOCs have a history of denying or delaying wireless carriers the full, fair, and reasonable interconnection they are obligated to provide. See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910 (1987), aff'd on recon. 4 FCC Rcd 2369 (1989).

the oversized 30 MHz MTA licenses adopted in the Order.[20] Time Warner, however, renews on reconsideration its misguided quest for 40 MHz licenses. Time Warner's arguments are entirely specious and should be rejected.

A. Forty MHz Blocks Are Not Needed to Share Frequencies With Fixed Users.

Time Warner Telecommunications ("Time Warner") willfully and misleadingly overestimates the amount of spectrum needed to work around incumbent fixed microwave operators. Time Warner betrays the retrograde nature of its approach when it notes that 40 MHz offers "more spectral room" to accommodate other users than would be available in a 10 MHz or 20 MHz block.[21] The very worst thing the Commission could do in the face of spectrum scarcity would be to permit licensees to waste "spectral room" in solving short-term interference problems that can and should be addressed through development and deployment of advanced, spectrally-efficient technologies. As Nextel has demonstrated in its Petition for Reconsideration, a mixture of 10 MHz and 20 MHz allocations will more than

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[20] American Personal Communications ("APC"), for example, which originally advocated 40 MHz spectrum blocks, now commends the Commission on its affirmation of "big vision PCS." Petition of American Personal Communications at 1.

[21] Petition of Time Warner at n 13, quoting remarks of Comsearch reported in Telecommunications Reports at 14 (September 6, 1993.)

suffice to allow development of PCS to proceed while incumbent users are being relocated.[22]

B. Competition and Diversity of Services Cannot Possibly Be Enhanced by Allocating Excessive Amounts of Spectrum to Each Licensee.

Time Warner strains its credibility to the breaking point when it asserts that granting bigger spectrum blocks to fewer licensees will somehow promote competition and diversity. It offers no affirmative support whatever for its remarkable view that a market characterized by multiple small licensees, each seeking to differentiate itself by serving unmet needs, will be a "non-competitive environment." Instead, it asserts that the Commission should have rejected a competitive model based on a multiplicity of participants simply because that model was favored by the parties with the most experience in serving the needs of wireless customers -- existing mobile services providers. Time Warner's views are without basis and should be rejected. The fact that the second largest cable system owner, affiliated with a Bell Operating Company, cannot compete without 40 MHz of spectrum to waste does not mean that more agile and imaginative participants will not do so.

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[22] Petition of Nextel at 6-9; see also Petition of CTIA at 5.

III. THE COMMISSION SHOULD NOT PERMIT SUBDIVISION OF SERVICE AREAS OR OF SPECTRUM.

National Telephone Cooperative Association ("NTCA"), US Intelco Networks, Inc., Columbia Cellular Corporation, McCaw, and others propose that the Commission permit voluntary partitioning of license areas. NTCA argues that the MTA/BTA market structure, combined with a buildout requirement under which a PCS licensee must serve 90% of the population in its market within ten years, is not suitable for promoting development of PCS in rural areas. The Commission's decisions allowing partitioning of cellular RSAs among the parties to full market settlements are offered as precedents for allowing PCS auction winners to assign portions of their markets to rural telephone companies and others.

While Nextel agrees that MTA markets are unsuited to the technical and market characteristics of PCS, Nextel does not recommend that the Commission adopt partitioning as a solution to the problems created by over-sized geographic markets. Partitioning would inject additional variables into the initial auction process and complicate the development of an orderly aftermarket. Instead, the Commission should license PCS spectrum to BTA-sized markets only. Those market boundaries should be retained intact for a period of years, until and unless experience demonstrates a need for partitioning or other changes.

Nextel recognizes that some BTAs cover vast, largely rural geographical areas, and that it may be difficult for a licensee to extend service within such a BTA in accordance with the Commission's ambitious buildout requirements. Nextel would therefore support some general relaxation of those requirements.

IV. HIGHER POWER LEVELS ARE NOT NECESSARY TO THE DEVELOPMENT OF PERSONAL COMMUNICATIONS SERVICES.

A number of petitioners ask the Commission to raise the maximum power level for PCS base stations from 100 watts (e.i.r.p.) to 1600 watts (e.i.r.p.).[23] Higher power, it is said, is needed so that PCS licensees may compete with cellular carriers, provide service in rural areas, and comply with the Commission's strict buildout requirements. US West even illustrates these points with a series of graphics showing how many PCS cells it takes to equal the coverage of one cellular cell.

The Commission has already considered and rejected the idea of setting PCS power limits at such levels.[24] It should stand by that decision. The Commission was wise, after observing that most experimental PCS systems could be accommodated by a limit of 10 watts of power for the base station, to provide for flexibility in the design of PCS

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[23] See, e.g. Petition of US West at 2-16; Petition of Ameritech at 1-2.

[24] Order, ¶¶ 153, 156.

systems by setting the maximum power limit well above that level. It would be most unwise to succumb now to petitioners' demands for still higher power. The powerful vision of a variety of low-power, microcellular PCS systems innovatively serving local telecommunications needs would evaporate. The development of PCS would be channeled down old familiar paths and the mechanical "cellular clone" model of PCS development would prevail.

V. THE COMMISSION SHOULD NOT IMPOSE COMPATIBILITY STANDARDS FOR PCS

In the Order, the Commission considered carefully whether it should adopt technical standards for the PCS service. The Commission found that, although there were benefits to be gained from detailed technical standards, the imposition of such standards would stifle the introduction of important new technology.[25] The Commission concluded that flexibility was the preferable approach, and left to the industry and the marketplace the task of ensuring the availability of such desirable features as roaming and interoperability.[26] Nextel supports these conclusions, and urges the Commission to deny the petitions of Motorola and others that seek further regulation in this area.

Government promulgation of standards would inevitably settle upon the lowest common denominator technology -- just

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[25] Order, ¶ 137.

[26] Id., ¶138.

the opposite of what the Commission has envisioned for PCS.[27] The approach the Commission has adopted, on the other hand, will allow new cutting-edge technologies to compete for acceptance by system operators and by the public. Technical developments do not always proceed incrementally or along paths a regulator could predict.

Nextel's ESMR system is but one example of how, in the absence of rigid technical rules, it is possible to leapfrog existing technologies. Others will, if allowed, also develop advanced, spectrally-efficient ways of using the spectrum licensed for PCS services to meet the diverse telecommunications needs of the American public. The Commission would be ill-advised to short-circuit this creative process by prematurely imposing compatibility standards.

CONCLUSION

PCS has the potential to make available to the public a diverse range of innovative new services and advanced, spectrally-efficient technologies. To promote this potential, the Commission must soundly reject so-called "big vision" proposals that are, in fact, grounded in a woefully limited vision of PCS as a cellular clone. PCS does not

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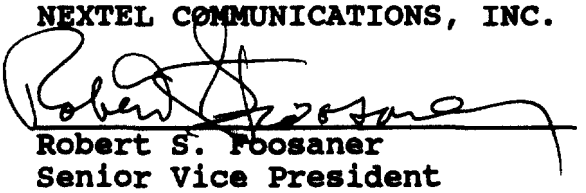
[27] See, e.g. Order ¶22 ("We expect that as actual PCS services and devices are developed, there will be significant further advances in technology that will expand substantially the number and types of wireless telecommunications services and devices available domestically and worldwide.")

require the large amounts of spectrum and high power levels sought by petitioners. Equipment standards should be allowed to develop in the market place, and should not be imposed by regulation. Proposals to impose PCS eligibility restrictions on SMR/ESMR licensees must be rejected as outside the scope of the notice given in this proceeding.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.



Robert S. Foosaner
Senior Vice President
Government Affairs

Lawrence R. Krevor
Director-Government Affairs

Its Attorneys

December 30, 1993

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing "Opposition to Petitions for Reconsideration" was served by first class mail, postage prepaid, this 30th day of December, 1993, to the following:

R. Michael Senkowski
Robert J. Butler
Suzanne Yelen
Wiley, Rein & Fielding
1176 K Street, N.W.
Washington, D.C. 20036
UTAM, Inc.

James D. Ellis
Paula J. Fulks
Southwestern Bell Corporation
175 E. Houston, R. 1218
San Antonio, TX 78205
Southwestern Bell Corporation

R. Michael Senkowski
Eric W. DeSilva
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20554
Wireless Information Network Forum

Gary M. Epstein
Nicholas W. Allard
James H. Barker
Latham & Watkins
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
Bell Atlantic Personal Communications, Inc.

Henry Goldberg
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Apple Computer, Inc.

Frank Michael Panek
Ameritech
2000 West Ameritech Center Dr.
Hoffman Estates, Illinois 60196
Ameritech

Jonathan D. Blake
Kurt A. Wimmer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
American Personal Communications

R. Gerard Salemme
Senior Vice President -
Federal Affairs
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036
McCaw Cellular Communications, Inc.

James P. Tuthill
Betsy S. Granger
Theresa L. Cabral
Pacific Bell
Nevada Bell
140 New Montgomery St., Rm. 1529
San Francisco, California 94105
Pacific Bell
Nevada Bell

James L. Wurtz
Pacific Bell
Nevada Bell
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Pacific Bell
Nevada Bell

Brian D. Kidney
Pamela J. Riley
PacTel Corporation
2999 Oak Rd., M.S. 1050
Walnut Creek, CA 94596
PacTel Corporation

James D. Ellis
Paula J. Fulks
Southwestern Bell Corporation
175 E. Houston, R. 1218
San Antonio, TX 78205
Southwestern Bell Corporation

Jay C. Keithley
Leon Kestenbaum
Sprint Corporation
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
Sprint Corporation

Francine J. Berry
Kathleen F. Carroll
Sandra Williams Smith
American Telephone and Telegraph Company
Room 3244J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
American Telephone and Telegraph Company

Michael F. Altschul
Vice President, General Counsel
Cellular Telecommunications
Industry Association
Two Lafayette Centre, Third Floor
1133 21st Street, N.W.
Washington, D.C. 20036
Cellular Telecommunications
Industry Association

Philip L. Verveer
Daniel R. Hunter
Francis M. Buono
Jennifer A. Donaldson
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Cellular Telecommunications Industry Association

Stuart F. Feldstein
Richard Rubin
Steven N. Teplitz
Fleischman and Walsh
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
Time Warner Telecommunications

Thomas A. Stroup
Mark Golden
Telocator
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036
Telocator, The Personal
Communications Industry
Association

Jeffrey S. Borke
U S West, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036
US West, Inc.

Eric Shimmel
Vice President
Telecommunications Industry
Association
2001 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
Telecommunications Industry
Association